Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTORER TERM, 1975

NO. ~~75~~-260

L. N. McDONALD and RAYMOND L. LAIRD,
Petitioners

v.

SANTA FE TRANSPORTATION COMPANY and TEAMSTERS FREIGHT, TANK LINE and AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners L. N. McDonald and Raymond Laird respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 21, 1975.

OPINION BELOW

The opinion of the Court of Appeals, a copy of which appears in the Appendix attached hereto, is reported at 513 F.2d 90. The opinions rendered by the United States District Court for the Southern District of Texas are unreported and appear in the Appendix attached hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee raises a claim under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

2. Whether white employees who were discharged for alleged misappropriation of company property when a similarly charged black employee was not discharged, have standing to sue under the Civil Rights Act of 1866, 42 U.S.C. §1981.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42

§2000e-2(a)(1) Unlawful employment practices—

Employer practices

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

United States Code, Title 42

§1981 Equal Rights under the law—

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

On September 26, 1970, Petitioners, who are white, were accused by the Respondent of having misappropriated certain of the Respondent's property. A black employee was similarly accused. On October 2, 1970, following an investigation by the Respondent, the Petitioners were terminated but the black employee was not.

On October 8, 1970, Petitioner McDonald initiated a grievance in which the charges of misappropriation were emphatically denied.[1] On April 3, 1971, Petitioner McDonald was notified that his discharge had been sustained and that his grievance would not be further pursued.

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1. Appendix F, p. 49.

On April 26, 1971, Petitioner McDonald filed a Charge of Discrimination with the Equal Employment Opportunity Commission in which he charged that his race had been a factor in the employment decision of Respondent to discharge him.

On August 16, 1971, Petitioners initiated an action against Respondent in the United States District Court for the Southern District of Texas invoking the Court's jurisdiction pursuant to 42 U.S.C. §2000e-5(f) and 42 U.S.C. §1981. Following discovery and certain Motion Practice, Petitioners filed their Second Amended Complaint on July 19, 1973.[2]

On January 4, 1974, the District Court denied Motions to Dismiss. At issue in the Motion was (1) the proposition of whether white persons may bring an action under 42 U.S.C. § 1981,[3] and (2) the proposition that the Plaintiffs who were discharged following their apprehension for the theft of their employer's property, while an equally guilty Negro employee was retained because of his race, have not stated a claim under Title VII.[4]

On May 2, 1974, the District Court issued a second Memorandum and Opinion in which it held that "[42 U.S.C.] §1981 is inapplicable to white persons";[5] additionally, the Court held "[T]hat the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted".[6]

2. See, Plaintiff's Second Amended Complaint, Appendix G.
3. Appendix D, p. 35.
4. Appendix D, p. 36.
5. Appendix C, p. 30.
6. Appendix C, p. 33.

The District Court apparently predicated its decision, in part, on the finding that Petitioners had failed to allege that they were falsely charged with misappropriating company property. This finding was adopted by the United States Court of Appeals for the Fifth Circuit.[7] In fact, evidence of each Petitioner's innocence of the charges of misappropriation had been squarely presented to the District Court.[8]

On appeal to the United States Court of Appeals For The Fifth Circuit the Fifth Circuit panel held, *per curiam*, that 42 U.S.C. §1981 "confers no actionable rights upon white persons," and "that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C. §§2000e *et seq.*"[9]

The Petitioners were never afforded an opportunity by the District Court to offer evidence that (1) they were innocent of the accusations, or that (2) the not-discharged black employee was equally culpable, and that (3) race was a factor considered by Respondent in their discharge.

7. "There is no allegation that the Plaintiffs were falsely charged." *McDonald v. Santa Fe Trail Transportation Company*, 513 F.2d 90 (1975).

8. As to Petitioner McDonald:
"These [C]harges are wrong and are unjust, because I did not steel [sic] anything. . ." Appendix F, p. 49.
As to Petitioner Laird:
"Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules." Appendix E, p. 39.

9. Appendix A, p. 23.

THE COURTS BELOW CLEARLY DISREGARDED CONGRESSIONAL INTENT AND DECISIONS OF THIS COURT IN FINDING THAT PETITIONERS HAD FAILED TO STATE A CLAIM UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED 42 U.S.C. §§2000e, ET SEQ.

Title VII of the Civil Rights Act of 1964 was enacted to "assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of the race, color, religion, sex or national origin". *Alexander v. Garnder-Denver Co.*, 415 U.S. 36, 41, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974). In *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct., 849, this Court examined Congressional intent to determine the scope of Title VII and found that discriminatory preferences for minority employees, as well as for majority employees, were intended to be proscribed by the Act:

> In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority *or majority*, is precisely and only what Congress has proscribed. (Emphasis supplied)

401 U.S. at 431.

Thus, the important question to consider in a case involving racial discrimination brought pursuant to Title VII is "whether, for any reason, a racially discriminatory employment decision has been made" *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800, 36 L.Ed.2d 668, 93 S.Ct. 1817 (1973).

In *McDonnell Douglas Corp., v. Green, supra*, this Court highlighted the important societal interest in fair and racially neutral employment decisions:

> There are societal as well as personal interests on both sides of this equation. The broad, overriding interest, shared by the employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.

411 U.S. at 801.

On this basis, federal courts facing claims of racial discrimination in employment have closely scrutinized the employment decisions of the charged employer to determine if the employer has placed more stringent requirements on employees because of their race. *See, e.g., Long v. Ford Motor Company*, 496 F.2d 500 (6th Cir. 1974); *McRae v. Goddard College*, ___ F.Supp. ___, 10 FEP Cases 143, 149 (D.C. Ver. 1975); *Martin v. Chrysler Corporation*, ___ F.Supp. ___, 10 FEP Cases 329, 332 (E.D. Mich., 1974); Also, CCH EEOC Decision No. 74-25 § 6400 (1973) and CCH EEOC Decision No. 74-95 § 6432 (1974).[10] The purpose of this judicial inquiry is to consider whether the employer's conduct was a mere pretext for the sort of discrimination prohibited by Title VII. *McDonnell Douglas Corp. v. Green, supra; Long v. Ford Motor Company, supra.* Particularly relevant to this determination is whether the

10. This Court has previously noted that "the administrative interpretation of the Act by the enforcing agency is entitled to great deference". *Griggs v. Duke Power Company, supra*, 401 U.S. at 433.

employer has applied the challenged employment policy equally to similarly situated employees of other races. *McRae v. Goddard College, supra.* In *McDonnell Douglas Corp., v. Green, supra,* a case involving an alleged discriminatory refusal to rehire, this Court had occasion to emphasize the importance of such evidence to a claim of racial discrimination:

> Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1). On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact a pretext. *Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired.* (Emphasis supplied)

411 U.S. at 804.

Like the Plaintiff in *McDonnell Douglas Corp. v. Green, supra,* Petitioners alleged that they were the victims of a racially motivated employment decision.[11] The employer answered that Petitioners were justifiably discharged for alleged unlawful activity against the company. The District Court, in its first Memorandum and Order dated January 4, 1974, showed concern over whether Petitioners had stated a claim upon which relief could

11. See, Plaintiff's Second Amended Complaint, Appendix G.

be granted.[12] However, since the District Court found this issue to be inadequately briefed, the Court felt constrained to deny defendants' motion to dismiss. In a subsequent opinion, dated May 2, 1974, the District Court, upon reconsideration of its earlier opinion, concluded:

> Upon reconsideration, the court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which relief can be granted.[13]

On appeal, the United States Court of Appeals for the Fifth Circuit joined in this determination:

> We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief can be granted.[14]

513 F.2d at 90

In finding that Petitioners had failed to state a claim upon which relief can be granted both Courts relied heavily on this Court's decision in *McDonnell Douglas Corp. v. Green, supra.* In particular, the lower federal courts apparently found the following language to be decisive:

12. See, Memorandum and Order, Appendix D. The first opinion of the District Court was issued pursuant to Motions to Dismiss filed by Defendants Santa Fe and International Brotherhood.

13. See, Memorandum and Order, Appendix C, p. 34.

14. See Appendix A, p. 23.

> Nothing in Title VII compels an employer to absolve and rehire one who has engaged in unlawful activity against it.

411 U.S. at 803

However, both Courts ignored this Court's caveat in *McDonnell Douglas, supra,* that the defense of discharge for unlawful activity against the company is not a complete defense in and of itself, but merely serves to rebut Petitioners' allegation of disparate and discriminatory disciplinary treatment. Indeed, this Court commanded that the "inquiry must not end here" and directed that "On remand, . . . respondent must . . . be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact a pretext." *Id.,* 411 U.S. at 804.

The fact that Petitioners were discharged for alleged unlawful activities does not obviate the employer's duty under Title VII, to maintain a neutral posture in making its employment decisions and to insure that their employment terms do not vary according to race for similarly situated employees. *See, e.g., Long v. Ford Motor Company, supra.*

As this Court astutely observed in *McDonnell Douglas Corp. v. Green, supra*:

> Petitioner may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, *but only if this criterion is applied alike to members of all races.* (Emphasis supplied)

411 U.S. at 804.

In finding that Petitioners had failed to state a claim upon which relief can be granted, it was necessary for the District Court to find that Petitioners could prove "no set of the facts in support of his claim which would entitle him to relief". *Conley v. Gibson,* 355 U.S. 41, 46, 2 L.Ed.2d 80, 78 S. Ct. 99 (1957). It is difficult if not impossible to imagine, in light of this Court's clear holding in *McDonnell Douglas Corp. v. Green, supra,* that Petitioners could prove no set of facts which would entitle them to relief under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e, *et seq.*

If Petitioners had been afforded an opportunity to show, as their pleadings alleged, that their employment terms varied from similarly situated employees of other races and it was this variance which was fatal to their employment, then it is submitted that a prima facie case of racial discrimination would have been established. *See e.g. McDonnell Douglas Corp. v. Green, supra; Long v. Ford Motor Company, supra; McRae v. Goddard College, supra.* Likewise, if Defendant could have shown, as their pleadings alleged, that Petitioners were discharged solely for their alleged unlawful activity against the company, then the burden would have shifted back to Petitioners. *McDonnell Douglas Corp., supra.*

However, the District Court did not give Petitioners the opportunity to show by competent evidence that the stated reason for discharge was in fact a mere cover-up for a racially discriminatory employment decision. Instead, the Court decided, that even if Petitioners could have shown, as they alleged, that their race was the determinative factor in deciding to discharge them, and not the similarly charged black employee, they would not be entitled to relief under Title VII. One cannot help but

wonder if the result would have been the same if the discharged Petitioners were black and the retained employee was white.[15]

The mandate of Title VII is clear in directing its thrust at eliminating employment decisions arising from a discriminatory preference for either minority or majority employees. In failing to recognize this, the Courts below have committed a serious omission which has operated to deprive petitioners of those very rights which Title VII was enacted to secure. On this basis, the decisions of the courts below, in finding that white employees who were dismissed for alleged misappropriation of company property while a similarly charged black employee was not dismissed, had failed to state a claim upon which relief could be granted under Title VII, is not justified and cannot be allowed to stand.

THE LEGISLATIVE HISTORY OF THE CIVIL RIGHTS ACT OF 1866, 14 STAT. 27, COMPELS THE CONCLUSION THAT WHITE EMPLOYEES HAVE STANDING TO CHALLENGE RACIALLY DISCRIMINATORY EMPLOYMENT POLICIES AND PRACTICES UNDER 42 U.S.C. §1981

After the adoption of the Thirteenth Amendment, Congress confronted the practical consequences of abolishing slavery by enacting enabling legislation pursuant to Section 2 of the new Amendment. In its original form, 42 U.S.C. §1981 was a part of this legislation designed to protect the rights secured to all Americans by the sweep-

15. The decisions of the Courts below, if left standing, could result in the perilous determination by future federal courts that Title VII does not protect whites from an employer's discriminatory preference for similarly situated minority employees.

ing terms of the Thirteenth Amendment.[16] Although 42 U.S.C. §1981 provides that "all persons . . . shall have the same right to make and enforce contracts, . . . and to the full and equal benefit of all laws for the security of persons and property *as is enjoyed by white citizens* . . ." (Emphasis supplied) this does not mean that only nonwhites may sue under §1981. To the contrary, from a review of the relevant legislative history of §1 of the Civil Rights Act of 1866, 14 Stat. 27, from which §1981 was ultimately derived, it is abundantly clear that the phrase—"as is enjoyed by white citizens"—was not intended to restrict the availability of this cause of action to nonwhites.

When construing §§1981 and 1982, this Court has relied heavily upon legislative history to determine the intent and scope of the Civil War Statutes. *See, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-44, 20 L.Ed.2d 1189, 1197-1200, 88 S.Ct. 2186, (1968) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 24 L.Ed. 386, 392, 90 S.Ct. 400 (1969).

16. Act of April 9, 1866, c. 31, §1, 14 Stat. 27, re-enacted by §16 of the Enforcement Act of 1870, Act of May 31, 1870, c. 114, §16, 16 Stat. 140, 144, and codified in §§1977 and 1978 of the Revised Statutes of 1874, now 42 U.S.C. §§1981 and 1982.

Section 1 provided in relevant part:

> "[A]ll . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and given evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."

The congressional intent of the Civil Rights Act of 1866 is best explained in the words of Senator Lyman Trumbull of Illinois, a principle draftsman of both the Thirteenth Amendment and the 1866 Act, and Chairman of the Senate Judiciary Committee. The civil rights bill, he explained, was "intended to give effect" to the Thirteenth Amendment by securing *"to all persons* within the United States practical freedom." (Emphasis supplied) Cong. Globe, 39th Cong., 1st Sess. 366 (1866). The scope of the Civil Rights Act of 1866 is revealed in the comments of Senator Trumbull during floor debate on the bill. In response to a charge by one of the bill's opponents that it was outrageous to provide federal protection for blacks that had never been accorded to whites, Senator Trumbull made it quite explicit that the bill was intended to protect the rights of whites, as well as blacks. The Senator stated:

> *"Sir, this bill applies to white men as well as black men.* It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his place and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, *a bill that protects a white man just as much as a black man?* With what consistency and with what fact can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very object of the bill is to break down all discrimination between black men and white men?"[17] (emphasis supplied).

Cong. Globe, 39th Cong., 1st Sess. 599 (1866).

Nor is there anything in the debates in the House that would contradict the Senate's understanding of the scope of the bill. *See,* the remarks of Congressman James F. Wilson of Iowa the bill's floor manager, Cong., Globe, 30th Cong., 1st Sess. 1115 (1866).

As stated above, 42 U.S.C. §1981 and §1982 were both derived and codified from §1 of the Civil Rights Act of 1866 which was intended to be permanent and inclusive of all races. Obviously then, these statutes should be construed consistently. In *Jones v. Alfred H. Mayer Co., supra,* this Court breathed new life into the Civil War statutes, long neglected, by holding that §1982 prohibited the respondent from refusing to sell a house to the petitioner, a negro, because of petitioner's race. In so holding, this Court clearly stated that if §1982 was to be given the scope that its origins dictated, then §1982 was to be accorded a sweep as broad as its language. *See, Jones, supra,* 392 U.S. at 437, 20 L.Ed.2d at 1206.

Moreover, this Court in its decision of *Sullivan v. Little Hunting Park, Inc., supra,* referred to its discussion of the legislative history of §1982 contained in *Jones* and stated:

> A narrow construction of the language of §1982 would be quite inconsistent with the broad and

17. This Court has previously relied on the comments of Senator Trumbull when deriving the intent and scope of the 1866 Act, and quoted lengthy excerpts of the Senator's floor debate concerning the Civil Rights Act of 1866. *See, Jones v. Alfred H. Mayer Co.,* 392 U.S. at 429-30, 431-32, 20 L.Ed.2d 1202-03 (1969).

> sweeping nature of the protection meant to be afforded by §1 of the Civil Rights Act of 1866, 14 stat. 27, from which §1982 was derived.

396 U.S. at 237.

Certainly this statement applies with equal force to the companion statute, §1981, since it too was derived from §1 of the Civil Rights Act of 1866.

In *Sullivan, supra,* this Court was squarely confronted with the question of whether a white person had standing to sue under 42 U.S.C. §§1981 and 1982. Sullivan, a white person, alleged that he had been expelled from a corporation which operated community recreational facilities solely because he had leased his house and assigned his membership share in the corporation to a black person. He sued for injunctive relief and damages under 42 U.S.C. §§1981 and 1982. This Court held that "Sullivan has standing to maintain this action". Although the Court referred explicitly to §1982 in setting forth the rationale for its opinion, *see,* 396 U.S. at 237, it did not limit its holding on the standing issue to §1982 alone. Thus, this Court has implicitly recognized that it is appropriate for a white person to sue under 42 U.S.C. §1981.

In light, then, of its legislative history, it is quite clear that §1981 should not be read as only providing a cause of action for non-whites. The phrase—"as is enjoyed by white citizens"—was apparently intended only "to emphasize the racial character of the rights being protected", *Georgia v. Rachel,* 384 U.S. 780, 781, 16 L.Ed.2d 925, 933, 86 S.Ct. 1783 (1966), and not to impose a limitation upon the scope of the protection afforded by §1981 to "all persons within the jurisdiction of the United

States". 42 U.S.C. §1981. Although the rights enjoyed by whites are used as a measuring stick under §1981, whites themselves may be denied rights which are normally available to members of their race. When that occurs, within the scope of activities protected by §1981, it provides white persons with a cause of action.

Thus, it remains for this Court to restore the protection of 42 U.S.C. §1981 to all persons, white and non-white, who are the victims of racial discrimination in employment. Petitioners submit that this case provides an ideal opportunity for the Court to consider this pressing question.

THIS COURT SHOULD FINALLY RESOLVE THE UNCERTAINTY AND CONFLICT IN THE LOWER COURTS AS TO WHETHER WHITE PERSONS HAVE STANDING TO CHALLENGE RACIALLY DISCRIMINATORY EMPLOYMENT POLICIES

In May of 1975 this Court joined the federal courts of appeal in holding that §1981 affords a federal remedy against discrimination in employment on the basis of race. *Johnson v. Railway Express Agency,* 44 L.Ed.2d 295, 301 (1975). This holding, considered in conjunction with the legislative history of the Civil War statutes, dictates that white persons be accorded protection against racial discrimination in employment under §1981. However, despite the clear mandate provided by Congress and the holdings of this Court, some lower courts have been reluctant to make the benefits of this statute available to all persons equally. Consequently, there is a division in lower court holdings as to whether white persons are entitled

under 42 U.S.C. §1981 to challenge discriminatory employment practices. Some courts have held that §1981 does not grant a cause of action to white persons. *See e.g. Perkins v. Banster,* 190 F.Supp. 98 (D. Md.), aff'd 285 F.2d 426 (4th Cir. 1960); *Kurylas v. U. S. Department of Agriculture,* 373 F.Supp. 1072 (D.C. D.C. 1974); and *Van Hoomissen v. Xerox Corp.,* 368 F.Supp. 829 (N.D. Cal. 1973). Other courts have held that §1981 does indeed protect white persons as well as non-whites. *See e.g. Dematteis v. Eastman Kodak,* 511 F.2d 306 (2nd Cir. 1975); *Cannon v. Action,* 303 F.Supp. 1240 (E.D. Mo. 1965), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971); *WRMA Broadcasting Co. v. Hawthorne,* 355 F.Supp. 577 (M.D. Ala. 1973); and *Hollander v. Sears, Roebuck & Co.,* 392 F.Supp. 90, (D. Conn. 1975).

In view of the unsettled state of the law on this question, and the split in the decisions of the Circuit courts, it is incumbent upon this Court to lay to rest any doubts that exist as to whether the protection of 42 U.S.C. § 1981 is to be extended to white persons. Petitioners respectfully submit that this Court could find no finer vehicle for the consideration of this question that the fact situation presented in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of August, 1975, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Mr. James P. Wolf, Dixie, Wolf & Hall, Suite 401, 609 Fannin St., Houston, Texas 77002 and Mr. Benjamin R. Powel, 808 Sealy & Smith Professional Building, P. O. Box 629, Galveston, Texas 77550, counsel for the Respondent. I further certify that all parties required to be served have been served.

APPENDIX A

L. N. McDONALD and Raymond Laird,
Plaintiffs-Appellants,
v.
The SANTA FE TRAIL TRANSPORTATION COMPANY et al., Defendants-Appellees.

NO. 74-2813.

United States Court of Appeals,
Fifth Circuit.

May 21, 1975.

Action was brought by discharged white employees claiming violation of their civil rights. The United States District Court for the Southern District of Texas, at Houston, Carl O. Bue, Jr., J., entered judgment against the discharged employees who appealed. The Court of Appeals held that statute giving all persons the same right to equal benefit of laws as is enjoyed by white persons confers no actionable rights upon white persons, and that discharge for misappropriation of company property, a charge not alleged to be false, while not dismissing similarly charged black employee did not provide a claim upon which relief could be granted under the equal employment opportunity provisions.

Affirmed.

* * *

James Bullock, Houston, Tex., for plaintiffs-appellants.

Benjamin R. Powel, Robert W. Alexander, Galveston, Tex., for Santa Fe Trail Transp.

James P. Wolf, Houston, Tex., for Local 988.

Appeal from the United States District Court for the Southern District of Texas.

Before WISDOM, SIMPSON and RONEY, Circuit Judges.

PER CURIAM:

[1] 42 U.S.C.A. § 1981 gives all persons within the jurisdiction of the United States the same right to equal benefit of the laws "as is enjoyed by white citizens." The district court held that this section confers no actionable rights upon white persons, and dismissed for lack of jurisdiction the § 1981 claim brought by the two white plaintiffs. We affirm. Perkins v. Banster, 190 F.Supp. 98 (D.Md.), aff'd, 285 F.2d 426 (4th Cir. 1960); Kurylas v. U. S. Department of Agriculture, 373 F.Supp. 1072 (D.D.C. 1974); Van Hoomissen v. Xerox Corp., 368 F.Supp. 829 (N.D.Cal.1973); Ripp v. Dobbs Houses, Inc., 366 F.Supp. 205 (N.D.Ala.1973); *Contra,* WRMA Broadcasting Co. v. Hawthorne, 365 F.Supp. 577 (M.D. Ala.1973); Gannon v. Action, 303 F.Supp. 1240 (E.D. Mo.1969), aff'd in part, remanded in part on other grounds, 450 F.2d 1227 (8th Cir. 1971); Central Presbyterian Church v. Black Liberation Front, 303 F. Supp. 894 (E.D.Mo.1969).

[2] We likewise agree with the district court's conclusion that an employer's dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged black employee does not raise a claim upon which relief may be granted under Title VII, 42 U.S.C.A. § 2000e et seq. There is no allegation that the plaintiffs were falsely charged. Disciplinary action for offenses not constituting crimes is not

involved in this case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *Cf.* NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939); Nix v. NLRB, 418 F.2d 1001, 1006 (5th Cir. 1969); AHI Machine Tool & Die, Inc. v. NLRB, 432 F.2d 190 (6th Cir. 1970).

Affirmed.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION
NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD, Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988, Defendants.

James Bullock, Houston, Texas, for plaintiffs.

Robert W. Alexander, McLeod, Alexander, Powel & Apffel, Galveston, Texas, for defendants The Santa Fe Trail Transportation Co.

James P. Wolf, Dixie, Wolf & Hall, Houston, Texas, for defendant International Brotherhood of Teamsters Local No. 988.

MODIFIED MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of Caucasians to bring suit under 42 U.S.C. § 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal.

1973); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23 (c)(1).

With regard to plaintiff Laird's allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiff, that charges filed before the EEOC pertained only to the employer, defendants Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where there is a "critical involvement of the collective bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of

a union under Fed. R. Civ. P. 20(a) is proper solely for limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____F. Supp.____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critical involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and that charges were filed with the EEOC by plaintiff McDonald against defendant Santa Fe Trail Transportation Company and Local 988, on or about April 26, 1971, allegedly on behalf of both plaintiffs. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local No. 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they were notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that the nature

of notice given upon termination of grievance proceedings would govern this Court's jurisdiction; that is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claim that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq*. However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of authority, the Court concludes for present purposes that

jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

ENTERED at Houston, Texas, this 13th day of June, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall,
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND OPINION

On January 4, 1974, this Court issued a Memorandum in which it noted an unresolved question regarding the standing of caucasians to bring suit under 42 U.S.C.

§ 1981. Subsequently, defendant Santa Fe Trail Transportation Company has brought to the Court's attention several cases on point, most notably the following: *Van Hoomissen v. Xerox Corp.*, 368 F. Supp. 829 (N.D. Cal. 1973); *Ripp v. Dobbs Houses, Inc.*, 366 F. Supp. 205 (N.D. Ala. 1973). Upon full consideration of the pleadings and authorities cited, it is the opinion of the Court that the better reasoned authorities hold that § 1981 is inapplicable to white persons. *See Van Hoomissen, supra,* 368 F. Supp. at 838-840. Defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of jurisdiction under § 1981 is granted.

With regard to plaintiffs' class action allegations, the Court has considered the entire record and particularly plaintiffs' allegations and concludes that the class of white persons who are employed or might be employed by The Santa Fe Trail Transportation Company in Houston, Texas, who are members or might become members of the Local 988, who have been discharged upon charges of misappropriating company property is not so numerous as to make joinder of all such members impracticable. Therefore, the Court concludes that this action may not be maintained as a class action. Fed. R. Civ. P. 23(c)(1).

With regard to plaintiffs' allegations against defendant Local 988, it has been alleged by this defendant, and not denied by the plaintiffs, that charges filed before the EEOC pertained only to the employer, defendant Santa Fe Trail Transportation Company. This Court has previously considered the requirement of exhaustion in Title VII cases with respect to uncharged unions and has concluded that the law requires such exhaustion as a jurisdictional prerequisite to any claim for damages. In limited cases where

there is a "critical involvement of the collective bargaining agreement and its interpretation and application to plaintiffs' allegations", then joinder of a union under Fed. R. Civ. P. 20(a) is proper solely for limited purposes pertaining to that "critical involvement" of the agreement. *See Held v. Missouri Pacific Railroad Co.*, ____ F. Supp. ____ (Civil Action No. 73-H-1053, S.D. Tex., filed April 3, 1974). The record in the present case indicates no proper basis for Title VII jurisdiction over defendant Local 988 and no critical involvement of the collective bargaining agreement. Therefore, this cause of action is dismissed as to defendant International Brotherhood of Teamsters Local No. 988 for want of jurisdiction.

With regard to defendant Santa Fe Trail Transportation Company's Motion to Dismiss for lack of Title VII jurisdiction, the present record is inadequate for determining whether or not plaintiffs complied with the 90-day jurisdictional requirements of 42 U.S.C. § 2000e-5(d). It is apparently agreed that the plaintiffs were charged with misappropriation on September 26, 1970, were discharged on October 2, 1970, and the charges were filed with the EEOC by plaintiff McDonald, allegedly on behalf of both plaintiffs, on April 26, 1971. Defendant Santa Fe alleges that a grievance filed by plaintiff McDonald with Local 988 on October 2, 1970, the same day as the discharge, reached a conclusion on October 29, 1970, more than 90 days before EEOC charges were filed. If this is true and the plaintiff McDonald had notice, then the Court is without Title VII jurisdiction. However, plaintiffs allege in their Second Amended Complaint that they were notified in writing by Local Union 988 on April 3, 1971, that collective bargaining rights had terminated. It appears to the Court at this stage in the proceedings that

the nature of notice given upon termination of grievance proceedings would govern this Court's jurisdiction; this is a matter which would require an evidentiary hearing.

With regard to defendant Santa Fe's claims that the arbitration award is binding upon the Court, counsel's attention is again directed to this Court's opinion in *Held* wherein it was noted that the law provides that pursuing a remedy under the collective bargaining agreement does not necessarily bar subsequent relief under Title VII. However, if the issues were identical to those before the Court, if the evidence and hearing dealt adequately and fairly with all factual issues, and the arbitrator actually decided the factual issues also pending before the Court, the Court may defer to such award. *See, e.g., Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972). The present record is inadequate at present for making such a determination in this case.

With regard to defendant Santa Fe's contentions as to plaintiff Laird, a supervisory employee not within the coverage of the collective bargaining agreement under which plaintiff McDonald processed a grievance, the Court is well aware that supervisory and non-supervisory employees are not treated identically under the Labor Management Relations Act, 29 U.S.C. § 141 *et seq.* However, as the Fifth Circuit Court of Appeals noted in *Rios, supra,* the interests protected by the LMRA and Title VII are not identical. No authority has been cited indicating that under the circumstances here present where plaintiffs Laird and McDonald were discharged for the same reason arising out of the same incident, the processing of a grievance by McDonald would toll the 90-day jurisdictional period only as to himself. In the absence of

authority, the Court concludes for present purposes that jurisdiction over plaintiff Laird is identical to that of plaintiff McDonald.

Finally, the Court has reconsidered its Memorandum and Opinion of January 4, 1974, wherein it stated:

> Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonald Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed.2d 688, 678, 93 S.Ct. 1817 (1973).

The pleadings of the plaintiffs do not allege that they were falsely charged with misappropriating company property; the substance of the allegations is that plaintiffs take issue with the fact that they were discharged for such conduct while a similarly charged Negro employee was not discharged. Upon reconsideration, the Court concludes that the dismissal of white employees charged with misappropriating company property while not dismissing a similarly charged Negro employee does not raise a claim upon which Title VII relief may be granted. For these reasons,

IT IS THE OPINION OF THIS COURT that this cause of action should be and hereby is dismissed with prejudice.

DONE at Houston, Texas, this 2nd day of May, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD & RAYMOND LAIRD,
Plaintiffs,

v.

THE SANTA FE TRAIL TRANSPORTATION CO.
& INTERNATIONAL BROTHERHOOD OF
TEAMSTERS LOCAL NO. 988,
Defendants.

James Bullock, Houston, Texas,
for plaintiffs.

Robert W. Alexander, McLeod, Alexander,
Powel & Apffel, Galveston, Texas,
for defendant The Santa Fe Trail
Transportation Co.

James P. Wolf, Dixie, Wolf & Hall
Houston, Texas, for defendant
International Brotherhood of
Teamsters Local No. 988.

MEMORANDUM AND ORDER

The plaintiffs, both Caucasian, allege that they and a Negro were charged jointly and severally with misappropriating company property for which the plaintiffs were

discharged but the Negro employee was not. It is alleged that the discharges were for racially discriminatory reasons. Defendant Santa Fe Trail Transportation Company (Santa Fe), the employer, and defendant Teamsters Local Union No. 988, of which only plaintiff McDonald is a member, have raised a variety of apparently valid defenses to federal jurisdiction based upon Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. However, jurisdiction based upon the Civil Rights Act of 1866, 42 U.S.C. § 1981, if proper, would bypass those defenses.

Defendant Santa Fe cites only *Barbour v. Railway Express Agency*, ____ F. Supp. ____ (Civil Action No. 72-235, N.D. Ala., filed Nov. 16, 1973) for the proposition that white persons may not bring an action under § 1981. The plaintiffs oppose the motion to dismiss without citing authority. Without conducting a thorough search, this Court has noted several cases in which jurisdiction was held to be proper. *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969) [§ 1982]; *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), *modified on appeal*, 450 F.2d 1227 (8th Cir. 1971); *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969). The U.S. Supreme Court has held that white persons have standing to sue under § 810(d) of the Civil Rights Act of 1968, 42 U.S.C. § 3610(d), although expressly reserving the question of standing under § 1982, also a provision of the Civil Rights Act of 1866. *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 34 L.Ed.2d 415, 419 § n. 8, 93 S.Ct. 364 (1972). Because this point has received inadequate briefing by the parties, the motions to dismiss for lack of jurisdiction will be denied at this time. They may be reurged during or

following a trial on the merits, thus allowing additional time for suitable briefing.

This Court is also concerned with whether the complaint states a claim upon which relief can be granted. Assuming, but not deciding, that the plaintiffs were discharged following their apprehension for the theft of their employer's property, this Court questions the validity of any challenge to a discharge properly brought. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 36 L.Ed. 2d 688, 93 S.Ct. 1817 (1973). Assuming, arguendo, that the plaintiffs were discharged because they were white while an equally guilty Negro employee was retained because of his race, this Court still questions whether the plaintiffs have stated a claim. (This Court assumes for present purposes that the Negro employee had a similar work record and similar degree of culpability in the offense.) This point has received inadequate attention in the pleadings filed by the parties and has not been briefed.

For the above reasons, the motions to dismiss must be denied at this time. This case will proceed to trial before the Honorable Peter T. Fay upon the assumption that jurisdiction lies; if the facts indicate no cause of action should lie, the case may be dismissed and the issue of jurisdiction will become moot. If the facts suggest that relief is warranted. then the Court may determine whether it has jurisdiction to award such relief.

DONE at Houston, Texas, this 4th day of January, 1974.

/s/ CARL O. BUE, JR.
Carl O. Bue, Jr.
United States District Judge

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION COMPANY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988
Defendants

ANSWERS OF THE SANTA FE TRAIL TRANSPORTATION COMPANY TO PLAINTIFFS' INTERROGATORIES

D. H. STRATTON, Houston Terminal Manager of The Santa Fe Trail Transportation Company, having been duly sworn, makes the following Answers to Interrogatories propounded to The Santa Fe Trail Transportation Company by L. N. McDonald and Raymond Laird, plaintiffs in the above entitled cause, such Answers to Interrogatories bearing the same number as Plaintiffs' Interrogatories.

I.(a) L. N. McDonald was discharged because of his dishonesty in the theft of company freight off of company equipment on company property and for violation of company rules.

(b) Raymond Lee Laird was discharged for failure to properly perform his duties, exercising poor judgment as General Dock Foreman and for violation of company rules.

II. This defendant objects to the form of the question, in that it is no question at all, but appears to be a demand for production of a document, which is neither authorized nor required by Rule 33; however, disciplinary action is that outlined in Article 46, Section I of Defendant's Contract with the International Brotherhood of Teamsters.

III. Copies of said Contract are delivered to each of defendant's employees by the Union.

IV.(a) L. N. McDonald and Raymond Lee Laird were the only employees employed at defendant's Houston Terminal by this defendant, who were discharged between January 1 and December 31, 1970.

(b) Date of their discharges was October 2, 1970.

(c) L. N. McDonald was initially employed on June 27, 1962, and Raymond Lee Laird was initially employed on July 27, 1961.

(d) McDonald's position, prior to discharge, was that of driver, and Laird's position or positions, prior to discharge, were that of driver, General Dock Foreman and Transportation Supervisor.

(e) McDonald, according to this defendant's latest information, resides at 301 Bryan Street, Houston, Texas, with Telephone Number 923-5453; Laird, according to this defendant's information, resides at 702 Janisch, Houston, Texas, with Telephone Number 697-7810.

(f) Same Answer as the Answer to Interrogatory No. I.

(g) White.

(h) McDonald, at time of termination, was employed at a wage scale of $4.45 per hour; Laird was employed, at the time of termination, at the rate of $800.00 per month.

(i) Laird was replaced by Roger C. Lowery, at a starting salary of $895.00 per month; however, Mr. Lowery terminated his employment on August 18, 1971. No particular replacement was hired to fill the vacancy created by McDonald's termination.

(j) This defendant objects to the form of questions, in that they are

(k) not questions at all, but appear to be a demand for production of

(l) documents, which is neither authorized nor required by Rule 33

(m) (This Answer applies to (j), (k), (l) and (m).

V. This defendant objects to the form of questions, in that they are

VI. not questions at all, but appear to be a demand for production of

VII. documents, which is neither authorized nor required by Rule 33.

VIII. This Answer applies to V, VI, VII, VIII and IX).

X.

X. No particular officer of the company initiated charges of misappropriating company property against the plaintiffs, L. N. McDonald and Raymond Laird, since the facts surrounding the events leading up to their termi-

nation were the result of a rather general investigation. D. H. Stratton, Terminal Manager at Houston, however, terminated their employ.

XI. Charles Jackson was not charged with mis-appropriating company property.

XII. Plaintiffs were discharged for reasons other than race. The reasons are outlined in Answer to Interrogatory No. 1, and the company has written Statements of the plaintiffs in support thereof.

/s/ D. H. STRATTON
D. H. Stratton

SWORN TO AND SUBSCRIBED BEFORE ME by the said D. H. STRATTON, Terminal Manager for The Santa Fe Trail Transportation Company, this 7th day of April, 1972, to certify which witness my hand and seal of office.

/s/ ETHEL M. MAIS
Notary Public in and for
Galveston County, Texas

McLEOD, ALEXANDER,
POWEL & APFFEL

By /s/ BENJAMIN R. POWEL
Benjamin R. Powel
808 Sealy & Smith Professional
Building
P. O. Box 629
Galveston, Texas 77550
Attorneys for Defendant, The
Santa Fe Trail Transportation
Company

CERTIFICATE OF SERVICE

I, BENJAMIN R. POWEL, hereby certify that service of the foregoing Answers to Interrogatories was made upon James Bullock, 4719 Dowling Street, Houston, Texas 77004; Isaac E. Henderson, P. O. Box 14061, Houston, Texas 77021, Attorneys for Plaintiff; and Dixie, Wolf & Hall, Suite 401, 609 Fannin Street Building, Houston, Texas 77002, Attorneys for Defendant, International Brotherhood of Teamsters Local No. 988, on this 7th day of April, 1972, by placing the same in the United States Mail, postage prepaid, Certified, Return Receipt Requested.

/s/ BENJAMIN R. POWEL
Benjamin R. Powel

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and RAYMOND LAIRD,
Plaintiffs

v.

THE SANTA FE TRAIL TRANSPORTATION COMPANY and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988,
Defendants

ORIGINAL ANSWER

COMES NOW Teamsters Freight and Tank Line Employees, Local Union No. 988, and files this Original Answer in response to the Complaint of L. N. McDonald and Raymond Laird, Plaintiffs herein, showing the Court as follows:

I.

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted as a class action because Plaintiffs will not fairly insure the adequate representation of the described said class, the rights sought to be enforced by this Complaint are not typical of the claims of the said class and the many questions of law and/or fact asserted in the Complaint as affecting the several rights of employees in the described class are not common.

II.

SECOND DEFENSE

Except for conclusionary allegations claiming discriminatory policies, practices, customs and usages which discriminate against members in the described class, the Complaint renders down to an allegation that the two Plaintiffs were discharged on or about October 2, 1970 by Defendant Company on charges that Plaintiffs had misappropriated Company property. The Complaint concludes that Plaintiffs were discriminated against because they were white and discharged whereas a Negro employee was also charged with misappropriation of Company property was not discharged.

The Complaint identifies Plaintiff, Raymond L. Laird, as a dock foreman at the Company's Houston terminal. As such, Plaintiff Laird differs from Plaintiff L. N. McDonald in that Foreman Laird is not within the contractually established bargaining unit. Defendant Union is prohibited from requiring the Company to recognize it as representing foremen or supervisory personnel by the Labor Management Relations Act. 29 U.S.C. 157, et seq. This factor not only shows that a class action does not exist here but explains why a grievance concerning the discharge of Plaintiff McDonald was processed but one for Laird was not. A copy of this grievance marked Exhibit A1 and A2 is attached to this answer. Plaintiff McDonald's grievance complaining that his discharge was forbidden by the contract because it was not for just cause was taken to final and binding arbitration by the Union in acordance with the contract. The award denying Plaintiff's grievance was final and binding on all parties.

The collective bargaining contract in effect between Defendant Union and Defendant Employer protects em-

ployees against discharge or suspension except for just cause and also contains a clause against non-discrimination. It reads as follows:

> "The Employer and the Union agree not to discriminate against any individual with respect to his hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex or national origin, nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of his race, color, religion, sex or national origin."

Plaintiff L. N. McDonald elected to pursue his contractual remedies for his discharge and any alleged discrimination on or about October 8, 1970. The main issue of whether Plaintiff was discriminated against unjustly by discharge has been judicially and finally decided by an arbitration tribunal of competent and proper jurisdiction in accordance with the collective bargaining contract. After full hearing his grievance was denied on or about October 21, 1970. The Court lacks jurisdiction over the Plaintiff's claim for his discharge because he elected to have it determined through use of the grievance procedure in the collective bargaining agreement and is now estopped from asserting the same claim in a new form in this action.

III.

THIRD DEFENSE

Plaintiff failed to utilize or exhaust his internal Union remedies or his remedies under the Labor Management Relations Act before bringing this action.

Without waiver of the foregoing special defenses and subject thereto, Defendants respond to Plaintiffs' pleadings as follows:

1. Defendant admits the alleged cause of action arises under Title VII of the Civil Rights Act of 1964 as alleged in paragraph I of the complaint.

Defendant denies that this is a proper procedure for a declaratory judgment.

2. Defendant denies that this is a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Plaintiffs allege that the class to be composed of white persons who are employed or might be employed at Defendant Company and who are members or who might become members of Local 938. As a matter of fact, one Plaintiff is a member of supervision and the other Plaintiff is a rank and file employee member of the appropriate bargaining unit. Congress has eliminated supervisory employees from the definition of employee in the Labor Management Relations Act. In the same Act unions are prohibited from requiring the employer to recognize them as representing supervisory employees or to bargain concerning their conditions of work, hire or tenure. Defendants deny that there are common questions of law and fact affecting the rights of the members of this class. Defendant further denies that it has caused members of the described class or any class to be limited or classified, and discriminated against in ways which deprived and intend to deprive them of equal employment opportunities and otherwise affect their status as employees because of race.

3. Defendant denies that it has maintained a policy, practice, custom or usage of discriminating against white

persons because of race with respect to compensation, terms, conditions and privileges of employment or that they have limited, segregated and classified employees of Defendant by race or in ways which deprive white persons of equal employment opportunities and adversely affect their status as employees.

4. Defendant Local Union No. 988 denies the allegations of paragraph IV of the Complaint. Defendant denies that it has instituted or maintained any policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964. The alleged policies, practices, and so on described in paragraph IV of the Complaint all relate to actions of Defendant Employer and not of Defendant Union.

5. The allegations of paragraph V of the Complaint are admitted.

6. Defendant is without knowledge as to the exact operations of Defendant Santa Fe Trail Transportation Company. Defendant Union admits the allegations of paragraph VI-B.

7. Defendant Union admits that it has been the recognized bargaining agent of the appropriate unit for bargaining described in its collective bargaining contract. It admits that Plaintiff L. N. McDonald was a member of the bargaining unit but denies that Plaintiff Raymond Laird was a member of the bargaining unit.

8. Defendant denies that it has violated its duty of fair representation required by the Labor Management Relations Act, but to the contrary, Defendant alleges that it has treated all employees in the bargaining unit on a non-discriminatory basis and that it represented Plaintiff

L. N. McDonald on his grievance fully, fairly and vigorously.

Defendant further denies that it has acquiesced or joined in any unlawful and discriminatory practices complained of in the Complaint or that it has failed to represent properly or to protect the white employees of the bargaining unit of Defendant Company from any discriminatory policies or practices. Defendant denies that it has engaged in a violation of the duty of fair representation or that the Company has knowingly colluded with the Union or participated in such alleged violations of the duty of fair representation.

9. Defendant specially denies that it has instituted, maintained and/or acquiesced in practices, policies, customs and usages which have denied Plaintiffs or other employees equal employment and opportunities because of their race or color, or that it has limited, segregated or classified persons because of their race or color. Defendant has not acquiesced in any policy, practice, custom or usage which would circumvent its collective bargaining contract which strictly requires that all persons in the bargaining unit be treated equally and without discrimination. Defendant denies that it has conspired or acted in collusion with Defendant Employer to deprive these Plaintiffs or any employees of any right. Defendant also denies that it breached its duty of fair representation or acted arbitrarily, capriciously in bad faith or for any invidious motivation towards these Plaintiffs. To the contrary, in regard to Plaintiff L. N. McDonald who filed a grievance, the Union represented him fully, fairly and vigorously in his grievance to a final and binding

award. The final award denying the grievance denied Plaintiff's claim that his discharge was unjust.

WHEREFORE, premises considered, Defendant Union prays that upon the final trial and hearing hereof Plaintiffs take nothing and that Defendant recover all costs of court incurred, and have such other and further relief, both general and special, legal and equitable, to which it may show itself justly entitled.

DIXIE, WOLF & HALL

By: /s/ JAMES P. WOLF
James P. Wolf
Suite 401, 609 Fannin St. Bldg.
Houston, Texas 77002
223-4444
Attorneys for Defendant Union,
Teamsters Local No. 988

CERTIFICATE OF SERVICE

I, James P. Wolf, certify that a copy of the foregoing Defendant Union's Original Answer was served on Mr. James Bullock, 711 Main Building, Houston, Texas 77002, and Mr. Isaac E. Henderson, 2619 Blodgett Street, Houston, Texas 77004, Attorneys for the Plaintiffs, by Certified Mail, Return Receipt Requested, and on The Santa Fe Trail Transportation Co., 6002 Esperson, Houston, Texas 77011, by regular mail, on this the 6th day of December, 1971.

/s/ JAMES P. WOLF
James P. Wolf

TEAMSTER FREIGHT & TANK LINE EMPLOYEES
LOCAL UNION NO. 988
HOUSTON, TEXAS

GRIEVANCE REPORT

Assigned To: Local 988 Date: Oct. 8, 1970

Company: Santa Fe

Employee's Address: 301 Bryan St. Employee's Telephone No.: WA. 3-54.53

Did you contact Steward Yes Steward's Signature [signature]

Explain as fully as possible nature of grievance. If necessary use reverse side:

Date grievance occurred Oct. 2, 1970

Time grievance occurred On or 2nd I, L.M. McDonald was unjustly discharged from Santa Fe Trail Trans. Co. for dishonesty & theft of freight.

These Charges are wrong and are unjust, because I did not steal anything or was not dishonest in any way. I was accused of stealing 10 cases of Anti-freeze off trailer 20435 till said was to be by supervisor that McAdoo at L.M.S. who is the shipping clerk, said (our)

TO THE JOINT SOUTHWEST AREA GRIEVANCE COMMITTEE:

This is to advise you that I hereby give authority to any Union Representative of Local Union No. 988 to represent me and ratify and confirm any and all things such Union representative may do in my behalf on this matter in the event that I do not make myself present at the Grievance Committee hearing for the above mentioned grievance.

Employee Signature L.M. McDonald

Steward's Report I did not take this down in writing but I was told by the Employee, and that the Charges are true

Give full details as to disposition:

DATE COMPLETED 10/15/70 Business Agent

there were some Antifreeze over on trailer 20438 and we could do what we wanted to do with it, and Mr. Laird told me what to do with this antifreeze.

APPENDIX G

IN THE
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 71-H-891

L. N. McDONALD and
RAYMOND LAIRD, *Plaintiffs*

v.

THE SANTE FE TRAIL TRANSPORTATION CO. and INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL NO. 988, *Defendants*

PLAINTIFF'S SECOND AMENDED COMPLAINT

I.

Comes now the Plaintiff, and as of course in accordance with Rule 15 (a), Federal Rules of Civil Procedure, amends the complaint in this action so that the same will read as follows:

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. sec. 1343 (4); 42 U.S.C., sec. 2000 e-S (f) and 28 U.S.C. secs. 2201 and 2202. This is a suit in equity, authorized and instituted pursuant to Title VII of the Act of Congress known as "The Civil Rights Act of 1964," 42 U.S.C. secs. 2000e et seq. The jurisdiction of this Court is invoked to secure protection of and to redress deprivation of rights secured by (a) 42 U.S.C. secs. 2000 e et seq., providing for injunctive and other relief

against racial discrimination in employment and (b) 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory within the jurisdiction of the United States. Jurisdiction of this Court is also invoked pursuant to 29 U.S.C. secs. 151 et seq., based on violations of fair representation owed to plaintiffs and the class they represent.

II.

Plaintiffs brings this action on their own behalf and on behalf of other persons similarly situated pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure. The class which plaintiffs represents is composed of white persons who are employed or might be employed by the SANTA FE TRAIL TRANSPORTATION CO. at its Transportation Terminal located in Houston, Texas and who are members or might become members of the Local 988, who have been and continue to be or might be adversely affected by the practices complained herein. There are common questions of law and fact affecting the rights of the members of this class who are, and continue to be limited, classified, and discriminated against in ways which deprive and tend to deprive them of equal employment opportunities and otherwise adversely affect their status as employees because of race conditions of employment. These persons are so numerous that joinder of all members is impracticable. A common relief is sought. Defendants have acted or refused to act on grounds generally applicable to the class.

III.

This is a proceeding for a declaratory judgment as to plaintiffs rights and for a preliminary and permanent in-

junction, restraining defendants from maintaining a policy, practice, custom or usage of (a) discriminating against plaintiffs and other white persons in this class because of race with respect to compensation, terms, conditions and privileges of employment and (b) limiting, segregating and classifying employees of defendant, SANTA FE TRAIL TRANSPORTATION CO. who are members of Local 988 in ways which deprive plaintiffs and other white persons in this class of equal employment opportunities and otherwise adversely affect their status as employees because of race.

IV.

The plaintiff, L. N. McDonald is a white citizen of the United States and a resident of the City of Houston in the State of Texas. Plaintiff, L. N. McDonald has been employed by Defendant as a truck driver at its transportation terminal in Houston, Texas and is a member in good standing of Local 988 of the International Brotherhood of Teamsters.

The Plaintiff, Raymond L. Laird is a white citizen of the United States and is a resident of the City of Houston and the State of Texas. Plaintiff, Raymond L. Laird has been employed by Defendant as a dock foreman at its transportation terminal in Houston, Texas for about nine and one-half years and is a member in good standing of Local 988.

V.

(A) Defendant, Santa Fe Trail Transportation Co. is a common carrier doing business in the State of Texas and the City of Houston. The Company operates and

maintains Ground Transportation and is an employer within the meaning of 42 U.S.C. sec. 2000e (b) in that the company is engaged in an industry affecting commerce and employ at least twenty-five persons.

(B) Defendant, International Brotherhood of Teamsters Local 988, is a labor organization within the meaning of 42 U.S.C. secs. 2000e (d) and (c) in that International Brotherhood of Teamsters Local No. 988 is engaged in an industry affecting commerce and exists, in whole or in part, for the purpose of dealing with the Company concerning grievance, labor disputes, wages, rates of pay, hours, and other terms or conditions of employment of the employees of the Company at its plants and other facilities in and around the City of Houston in the State of Texas. The International Brotherhood of Teamsters Local 988 has at least twenty-five members.

VI.

The following policies, practices, customs and usages made unlawful by Title VII of the Civil Rights Act of 1964 and 42 U.S.C. sec. 1981, providing for the equal rights of all persons in every state and territory have been instituted and/or maintained by the defendants, as well as violations of the duty of fair representation owed to plaintiffs under 29 U.S.C. secs. 151 et seq.

(A) On or about October 2, 1970, the plaintiffs, L. N. McDonald and Raymond Laird were discharged from employment by Defendant, Santa Fe Trail Transportation Company without cause and on information and belief, Plaintiffs alleges that they were discharged of their race, Caucasian.

(B) On or about September 26, 1970, Plaintiffs, along with one negro employee, Charles Jackson were all charged jointly and severally charged with mis-appropriating company property, to-wit; ten cases of six one gallon cans of anti-freeze, all of which were part of a shipment of twenty-five cases being shipped to Defendants' customers.

(C) On October 2, 1970, Defendant discharged Plaintiffs, L. N. McDonald and Raymond L. Laird while retaining the negro employee, Charles Jackson in its employ, Plaintiffs allege that Defendant imposed a more severe disciplinary sanction against them because of their race, Caucasian than against their negro counterpart.

(D) On or about October 2, 1970, Plaintiffs filed a grievance with the Local Union 988 pursuant to the Article 44 of its collective bargaining agreement in accordance with the Procedure outlined for settling such disputes.

(E) On or about April 3, 1971, Plaintiffs were notified in writing by Local Union 988 that it would not pursue the claim or grievance any further and would not seek arbitration.

(F) On or about April 7, 1971, Plaintiffs filed a complaint with the E.E.O.C. which was approximately six months and three days from the day the grievance was first filed with the Union. Plaintiffs allege that the delay in filing with the E.E.O.C. was consumed in grievance procedures under an existing collective bargaining agreement and that the 90-day statute was tolled during such period.

VII.

On April 7, 1971, Plaintiffs filed a timely and proper complaint before the Equal Employment Opportunity Commission (E.E.O.C.) alleging denial by Defendant of their rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e et seq. On July 15, 1971, the Commission notified plaintiffs under the provisions of Section 706 (e) of Title VII of the Civil Rights Act of 1964, the plaintiffs had the right to bring a civil action in a United States District Court.

Neither the State of Texas nor the City of Houston has a law prohibiting the unlawful employment practices alleged herein.

VIII.

Plaintiffs do hereby incorporate and adopt by reference all of the allegations set forth in Paragraph I through VII of this complaint.

IX.

At all times material herein Local 988 and the International Brotherhood of Teamsters have been certified recognized representatives under the National Labor Relations Act of the plaintiffs and the class they represent.

X.

Defendants, International Brotherhood of Teamsters and Local 988 have violated and continue to violate their duty of fair representation imposed on them by the National Labor Relations Act in that they have acquiesced and/or joined in the unlawful and discriminatory practices

complained of in Paragraph VI and they have failed to protect the White members of the Company from said discriminatory policies and practices. The Company has knowingly participated in or acquiesced in said violation of the duty of fair representation.

XI.

Plaintiffs and the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a preliminary and permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the defendant's policies, practices, customs and usages as set herein.

WHEREFORE, Plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant Plaintiffs and the class they represents a permanent injunction enjoining the defendant Santa Fe Trail Transportation Co. its agents, successors, employees, attorneys and those acting in concert with it at its direction from continuing to maintain discriminatory disciplinary policies that imposes more severe disciplinary sanctions against Plaintiffs because of their race, Caucasian than against their negro counter-part, denying Plaintiffs rights to equal treatment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq.

2. Grant Plaintiffs a preliminary injunction ordering the Defendant, Santa Fe Trail Transportation Co. to re-

instate L. N. McDonald and Raymond L. Laird with all back pay wages lost, monetary losses and seniority lost as a result of the discriminatory discharge.

3. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant, International Brotherhood of Teamsters Local 988, its agents, successors, employees, attorneys and those acting in concert with it and at its direction from continuing or maintaining the policy, practice, custom and usage of denying, abridging, withholding, conditioning, limiting, or otherwise interfering with the rights of plaintiffs to be impartially and fairly represented on the basis of merit rather that race, and the right to equal representation as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C., Sections 2000e et seq.

4. Grant Plaintiffs and the class they represent a permanent injunction enjoining the defendant International Brotherhood of Teamsters Local 988 its agents, successors, employees, and those acting in concert with it from refusing to properly and diligently represent plaintiffs and the class they represent.

5. Order the Defendants to take that affirmative action necessary to correct the practices, policies, customs and usages which discriminates against Plaintiffs and members of the class plaintiffs represents because of their race, Caucasian.

6. Plaintiffs further pray that this Court will allow them cost herein, reasonable attorney's fees and grant such

further additional or alternative relief as may appear to the court to be equitable and just.

Respectfully submitted,

JAMES BULLOCK
James Bullock
Attorney at Law
4719 Dowling Street
Houston, Texas 77004
713-529-4701

CERTIFICATE OF SERVICE

I, James Bullock, certify that a copy of the Plaintiff's Second Amended Complaint was served upon the following by certified mail: Attorney Robert W. Alexander, Post Office Box 629, Galveston, Texas 77550 on this 17th day of July, 1973. Attorney for the Defendant, Santa Fe Trail Transportation Company. And Mr. James P. Wolf, Esquire, Dixie, Wolf & Hall. 609 Fannin St. Houston, Texas 77002.

/s/ JAMES BULLOCK
James Bullock